No. 11091

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Idaho, Southern Division

Civil Action No. 2266

UNITED STATES OF AMERICA,

Plaintiff,

v.

P. G. BATT,

Defendant.

COMPLAINT

The United States of America, by its attorney, John A. Carver, United States Attorney for the District of Idaho, complains of the defendant, and for its cause of action alleges as follows:

1. Plaintiff, the United States of America, is and was at all times hereinafter mentioned a corporation sovereign and body politic, and brings this action under Section 3744 of the Internal Revenue Code.

2. This suit is commenced at the request of the Commissioner of Internal Revenue and by direction of the Attorney General of the United States.

3. Defendant, P. G. Batt, is a resident of Wilder, Canyon County, Idaho.

4. During the calendar year 1938, defendant had individuals in his employ to whom he paid total wages in the amount of $30,198.38. By reason of such employment, there became due and owing from the defendant for the said year 1938, excise taxes under Title IX of the Social Security Act in the amount of $681.15.

5. On January 26, 1939, defendant filed with the Collector of Internal Revenue for the Collection District of Idaho a return of excise tax for the calendar year 1938 with respect to having individuals in his employ under Title IX of the Social Security Act. In his said return, defendant reported total wages subject to tax in the amount of $22,-705.08 and tax thereon at three per cent in the amount of $681.15. Defendant paid on account of the said tax the sum of $68.11, [3] and defendant is entitled to credit against the tax for contributions paid into the unemployment funds of the State of Idaho in the amount of $41.71, leaving a balance of $571.33, no part of which has been paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of $571.33, with interest and costs.

JOHN A. CARVER
United States Attorney
R. W. BECKWITH
Assistant United States
Attorney

[Endorsed]: Filed January 27, 1944. [4]

[Title of Court and Cause.]

ANSWER

Comes Now The defendant, P. G. Batt, and for an answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph 1. of the plaintiff's complaint herein;

II.

Defendant admits the allegations contained in paragraph 2. of plaintiff's complaint herein;

III.

Defendant admits the allegations contained in paragraph 3. of plaintiff's complaint herein;

IV.

Defendant admits that "during the calendar year 1938, defendant had individuals in his employ to whom he paid total wages in the amount of $30,198.38," but denies each and every other allegation contained in paragraph 4. of plaintiff's complaint herein;

V.

Defendant admits all of the allegations contained in paragraph 5. of plaintiff's complaint herein, excepting that it is specifically denied there is a balance of $571.33, or any other sum due from the defendant to plaintiff, and in this connection alleges the fact to be that the employment and services for which wages were paid were exempt from the tax imposed by the terms of Title IX of the Social Security Act, in that said services were agricultural labor.

Wherefore, defendant prays that the defendant

take nothing herein, and that judgment be entered in favor of the defendant.

W. H. LANGROISE
SAM S. GRIFFIN
Attorneys for Defendant [5]

Service Of the above and foregoing Answer is hereby acknowledged, by receipt of a copy thereof, this 1st day of Feby, 1945.

JOHN A. CARVER
United States Attorney
R. W. BECKWITH
Assistant United States Attorney
Attorneys for Plaintiff

[Endorsed]: Filed February 1, 1945. [6]

[Title of Court and Cause.]

STIPULATION OF FACTS

It is stipulated and agreed between the parties to this action, through their respective attorneys, that the following facts are true and may be considered as having been given in evidence reserving to each party the right to introduce other and additional evidence;

I.

Allegations of paragraphs 1, 2 and 3 of the complaint are true.

II.

The time involved herein, and statements of facts herein, relate to the calendar year 1938 except where otherwise stated.

Statutes involved are Title IX of the Social Security Act, an Act of Congress, as it existed in 1938, and the Unemployment Compensation Law of the State of Idaho as it existed in 1938. Both acts shall be considered as having been introduced in evidence and may be referred to and used to the extent that either is relevant and pertinent.

Certified copy of Annual Return of Excise Tax for 1938 filed by P. G. Batt, the defendant, and of Assessment Certificate and portion of January 1939, Social Security Tax Assessment List, Idaho Collection District, showing [7] assessment of $68.11 against P. G. Batt, Wilder, Idaho, shall be considered as having been introduced in evidence and may be referred to and used to the extent that either is relevant and pertinent.

Defendant P. G. Batt is the same person as the applicant for refund of Idaho Unemployment Compensation taxes for the year 1938 (and other years) involved in a case decided by the Supreme Court of Idaho on March 19, 1942, reported under the name of In Re Refund of Contributions of P. G. Batt Under Unemployment Compensation Law, P. G. Batt, Appellant, v. Unemployment Compensation Division, Industrial Accident Board of Idaho, in 63 Idaho 572, 123 Pacific (2d) 1004, and the decision and opinion of said Court, and said

reports thereof, shall be considered as introduced in evidence and may be used and referred to.

The fact labor, wages, employment, business and facts involved in the decision last above referred to are identical with those involved herein.

III.

Defendant P. G. Batt was a farmer owning or farming as a tenant between 800 and 900 acres of farm lands near Homedale and Wilder, Idaho, upon which he raised potatoes, onions, lettuce, carrots and peas (and other farm crops). He also operated, seasonally, two "processing" sheds, one at Homedale and one at Wilder, in Idaho, located at trackage thereat, and off his farm lands. At such sheds he employed labor during seasons hereinafter stated, in "processing" the potatoes, onions, lettuce, carrots and peas raised upon his farms; other farm producers of similar produce employed him and his crews to "process" their produce, and paid for this service. [8]

The individuals employed, and the total wages upon which excise tax is claimed, and contributions mentioned, in paragraph 5 of the complaint, and the services of employees are in respect to the above, and hereinafter, described "processing" operations.

Approximately 25% of the produce "processed" was raised and owned by defendant, Batt; approximately 75% thereof was raised and owned by various farmers who employed Batt and such labor.

IV.

That either by reason of State or Federal statutes or regulations, or by reason of the requirements of the purchasers of the produce above mentioned, and to make the same saleable, it is necessary that as to each thereof the same be processed, graded, packed and prepared for market in the manner hereinafter set forth; that none of the produce processed by the defendant was sold directly to the ultimate consumer; that he sold all said marketable processed produce in the following manner—some to track buyers f.o.b. cars at the packing sheds, who thereupon shipped the same out of the State; that some was sold to jobbers usually on wire orders received through brokers and were shipped outside of the State and to all parts of the United States, where such jobbers broke up carload lots into smaller lots and resold to wholesalers or distributers to consumers; that the remainder was sold to what are known as car lot distributers, who bought from the applicant in car lots and themselves sold in car lots to other distributers or jobbers, and who did not sell to ultimate consumers.

Such produce was not saleable, and there was no market for it without having been processed, graded and packed as hereinafter stated, and it was not saleable in [9] bulk to ultimate consumers as, or in the condition in which, it was harvested in the fields; that the United States government would not purchase said produce for distribution on relief unless the same was so processed;

That the equipment in the operations hereinafter stated was not specialized but was available generally to farmers or could be readily procured by them, or satisfactory substitutes used, and could be, and in a number of instances were, used on the farms where the produce was produced, and that many farmers did in fact process, pack and grade, and conduct the operations hereinafter set forth on their own premises, in which event such farmers were not charged and did not pay contributions on account of the employees engaged therein; that in the section of Idaho from Twin Falls east to the vicinity of Idaho Falls, Idaho, in respect to potatoes it was common practice for the farmers of large acreage to have potato cellars either on their own premises or elsewhere, and to employ crews of men who made it their business to go from farm to farm or cellar to cellar and use their own equipment, conduct the operations hereinafter stated, and receive their compensation from the farmer and upon which compensation no contribution was or need be paid;

That in respect to peas the largest dealers in Idaho grew their own peas on owned or leased lands and processed their own produce, the processing taking place off such lands in warehouses or sheds available to tracks, performing the same operations as hereinafter stated in the case of the defendant and were not required to and did not pay any contribution with respect to the employees engaged in such operation;

V.

That aside from the produce raised by the defendant [10] the balance of such produce which was processed as hereinafter set forth was secured in the following ways:

The defendant purchased from the farmer grower that portion of his crop which was found to be marketable when and after sorted and graded. To enable defendant and the farmer to determine the part purchased and to prepare the same for market the farmer delivered such produce at the defendant's shed or warehouse, contained in half bags as taken by the farmer directly from the field as harvested.

The defendant also handled a comparatively small part of potatoes, after processing, on consignment, in which case the farmer delivered the potatoes from the field as harvested, and after the defendant had processed the same as hereinafter stated and sold the same there was deducted from the sale price the expenses, including a charge for processing and a brokerage charge, and the balance was paid to the farmer.

In the case of all produce the culls or other non-marketable produce was owned by and went back to the farmer producer or were disposed of as he directed, and did not go into market.

In the case of lettuce, peas and carrots, the defendant processed and sold that grown by him, and that which was not grown by him he handled only on consignment for the farmer owner as above.

VI.

That as to each of said products the processing operation was seasonal, largely at the time of harvesting the crop. In the case of potatoes in the district where defendant operated the harvest began about July 5th and was usually completed by September 15th. In the case of onions the season began about August 15th and continued until freezing, which was usually about November 1st, and there-
[11] upon the operation was largely ended. To a small extent some onions were stored either as purchased by the defendant or stored by the farmer in the defendant's storage or elsewhere, and when ready to ship were processed and prepared for shipment. The storage period for onions ended usually in March. Process operations on stored onions were not continuous or regular, taking place from time to time as market conditions justified and shipments were demanded, and crews or employees were picked up at the particular time as needed, used for the particular shipment, and discharged.

The harvesting, processing, packing and shipping of lettuce is highly seasonable, beginning about October 1st and ending with severe frost about November 15th, and all the operations cease with the termination of harvesting.

In the case of carrots, the season's operations run for about one month, commencing about September 15th and ending October 15th.

In the case of peas, the entire operation is during the harvest season only, which lasts about one month, usually in June.

VII.

The employees used by the defendant in processing operations, and commonly used throughout the State of Idaho therein, consist of women and men, who are not required to have any special skill. Almost any able-bodied person is capable of doing the work, and the work is largely done by transients, many employees only staying on the job for a day or two, although others continue through the particular season. Practically all growers of the produce or the farm help have the capacity or knowledge to perform any of the operations and the type of work, except as between men and women, is largely interchangeable, that is, one [12] man can perform one operation at one time and another operation at another time, and in the instances where a particular employee continues at one operation it is only in the case where there is sufficient produce going through the process to make it a more efficient operation to keep such employee at that particular work. Very frequently the person who has been employed on the farm in harvesting comes into the processing sheds and is employed in the processing operation. Frequently when smaller quantities of produce are going through the operation a single employee will perform a number of the different operations.

VIII.

The operations which took place at the defendant's sheds and which constituted "processing" as used herein, were primarily a cleaning, sorting,

grading and packing operation, and in no way changed the raw produce; they were as follows:

The produce from the defendant's farming operations and the produce of other farmers, as hereinbefore stated, were intermingled and went through the process together.

In the case of potatoes the produce arrived at the sheds covered with dirt and intermingled with clods, vines, sticks, culls, and bruised, cut, rotten and misshaped potatoes just as dug from the ground. The vines and many of the clods were picked out by hand and other dirt screened out, and then were placed in a mechanical washer partly for the purpose of precooling and partly to clean. The cooling and cleaning operation was sometimes done by spraying with hose. After being washed the produce was placed on tables where it was hand sorted and graded and the marketable portion placed in bags which were usually branded. After the sack was sewed it was trucked by hand into the [13] cars where the employees packed or stacked for shipment, and the car was iced by placing ice in bunkers at the end of each car. The potatoes which had been discarded as not marketable and refuse went back to the producer of them, and in the case where the defendant bought the marketable portion of the potatoes resulting payment was made to the producer on the basis of the marketable potatoes thus ascertained. In the case of potatoes the operation above described is frequently done by a farmer himself on his farm, or at other suitable locations,

or by travelling crews as hereinbefore stated as part of ordinary farm operations.

In the case of onions the same operation took place, except that the same were not washed.

In the case of lettuce, delivery was made by the farmer in his own truck, and the defendant's crew took over at the shed. The first operation was trimming, which consisted of cutting off the butt, clipping off surplus wrapper leaves and broken and discolored leaves, and discarding heads which were unsuitable for market. The marketable heads were then placed on a table and were divided according to size and placed in crates containing the same sized heads. During this process any other unsuitable heads were discarded. As the marketable lettuce was packed in the crates ice was placed between each layer, and the crate stamped to designate the number of heads per crate. A paper pad was put on top of the crated lettuce and ice placed over it, the paper folded across the top and the cover nailed on, and the crate then conveyed into the car and loaded, and when loaded ice was placed in the car over the tops of the crates. The employees, in addition to the above operations, prepared the ice and cleaned up the refuse, and were from time to time engaged in checking the amounts [14] received and going into cars, and disposing of culls. None of the operations were specialized, but were capable of being handled and frequently were handled by one person. The same class and type of work in the same operations are frequently done on the farms

by the producer himself and his employees as part of ordinary farming operations.

In the case of peas, delivery was made from the farm in sacks, the contents of which were dumped on a table and the unmarketable peas such as those too small, ill-shaped, broken, bruised and old, were picked out by hand, usually by women. They were not sized or graded otherwise. The remaining marketable peas were placed in hampers or tubs, and in some instances the top layers were straightened out or "faced" in order to make the hamper or tub more attractive. The hamper or tub was labeled and a cover placed on it, and then went into a tank of cold water in which it was immersed for precooling, after which it was taken into the car and loaded, and ice placed over the top for refrigeration.

In the case of carrots, the farmer producer graded and tied in bunches on the farm, placed the same in crates, and the crates were delivered to the defendant. The bunches were then washed, sized, packed and placed in cars, ice being placed in the crates and in the cars as in the case of lettuce.

From the time of the enactment of, and by reason of, the Idaho Unemployment Compensation Law and until subsequent to the year 1938 the defendant paid to the State of Idaho, under protest, contributions or taxes for and computed upon, wages for services of individuals employed in connection with the processing operations hereinbefore [15] detailed. As shown by the Return in evidence such wages were $22,705.08; the excise tax claimed by plaintiff on account thereof is $681.15; for that year, and

wages and services, defendant paid to the State of Idaho contributions in the amount of $613.04, leaving a balance of $68.11 which defendant paid to, and which was received by, plaintiff on January 26, 1939.

In 1941 defendant, pursuant to provisions therefor in the above referred to Idaho law, applied to the Industrial Accident Board of Idaho, for a refund of all contributions paid to the State of Idaho by defendant under such Idaho law on account of such services and wages since enactment of such law to and including a portion of the year 1941 (and including the year 1938, the year in controversy herein.) The ground for refund was that the services were, and the wages were for, "agricultural labor" and therefore under the Idaho law excepted from tax or contributions on account thereof. The proceedings for refund resulted in the decision and opinion of the Supreme Court herein referred to and in evidence, and after and as result of such decision refund was made by the State of Idaho for a period of three years preceding the application for refund, and included therein were contributions paid for the year 1938 in the amount of $571.10.

Dated this 1st day of Feby, 1945.

JOHN A. CARVER
United States Attorney
R. W. BECKWITH
Assistant United States Attorney
Attorneys for Plaintiff
W. H. LANGROISE
SAM S. GRIFFIN
Attorneys for Defendant

[Endorsed]: Filed February 9, 1945. [16]

[Title of Court and Cause.]

OPINION

Filed March 15, 1945

John A. Carver, United States District Attorney, E. H. Casterlin, and R. W. Beckwith, Assistants, Boise, Idaho. Attorneys for the Plaintiff.

William L. Langroise and S. S. Griffin, Boise, Ida., Attorneys for the Defendant.

March 15th, 1945

Cavanah, District Judge.

The nature of the suit is on wherein the United States seeks to recover the sum of $571.33 as an excise tax for the calendar year 1938, with respect to individuals in the defendant's employ, under Title 9 of the Social Security Act, as then existed.

The defendant answers and alleges that the employment and services, for which wages were paid, were exempt under the Act from the tax imposed, in that the services were "Agricultural Labor".

The facts are stipulated, and the crucial question to be considered is: Does the Act and facts recognize the interpretation that the services rendered come under the exempt provisions of the Act, and in determining this issue the particular facts of each case must be considered, in order to [19] ascertain what was the intention of Congress in exempting from the operation of the Act "Agricultural Labor".

The plaintiff contends that the services rendered were of a commercial character, in the field of industry, and not true "Agricultural Labor", while the defendant asserts that the term "Agricultural Labor" must be given a meaning wide enough to include agricultural labor of any kind, as generally understood throughout the United States, in connection with the cultivation of the soil, raising and harvesting crops, including to a variable extent the preparation of the products for consumption, which "processing" is necessary for disposal, by marketing or otherwise.

What then is a fair analysis of the facts here? It requires a consideration of the nature of the activities of defendant, who was a farmer owning, or operating as a tenant, between eight and nine hundred acres of farm land, near Homedale, and Wilder, Idaho, upon which he raised potatoes,

onions, lettuce, carrots, peas, and other farm products. He also operated, seasonally, two "processing" sheds, one at Homedale and one at Wilder, located at trackage thereat, and off his farm land. At such sheds he employed labor, during seasons, in "processing" potatoes, onions, lettuce, carrots and peas, raised upon his farms, and other farm producers of similar produce employed him, and his crew, to "process", grade, pack and prepare for market, their produce, and paid for that service.

The individuals, upon whose wages the excise tax is claimed, the contributions made, were employed in processing, grading, packing and preparing for market operations. Approximately 25% of the produce so "processed", graded, packed and prepared for market, was raised and owned by the defendant, and 75% thereof was raised and owned by various farmers, who employed defendant and such labor.

It appears necessary, by reason of Federal and State [20] statutes, and the requirements of the purchasers of produce, to make such produce salable, that each thereof be processed, graded, packed and prepared for market in the manner herein referred to. None of the produce, so handled and processed by the defendant, aws sold directly to the ultimate consumer, as he sold all marketable processed produce to track buyers, F.O.B. cars at the packing sheds, who thereupon shipped the same out of the state. Some were sold to jobbers, usually on wire orders received through brokers, and shipped to all parts of the United States, where such jobbers

broke up carload lots into smaller lots, and resold to wholesale or retail distributors, and through them to the ultimate consumers; the remainder was sold to what is known as car-lot distributors or jobbers, who did not sell to the ultimate consumers. Such produce was not salable, and there was no market for it, without having been so processed, graded, packed and prepared for market, and was not salable in bulk to the ultimate consumers in the condition in which it was in the field, and the United States Government would not purchase the produce, for distribution on relief, unless it was processed.

The equipment employed in the operations was not specialized, but was available generally to farmers, and used on the farms where the produce was produced, and many farmers conducted the operation of processing, packing and grading, etc., on their own premises, in which event the farmers were not charged, and did not pay, contributions on account of the employees engaged therein.

In the section of Idaho, from Twin Falls east to the vicinity of Idaho Falls, Idaho, in respect to potatoes, it was the common practice for the farmers of large acreage to have potato cellars, either on their own premises or elsewhere, and to employ crews of men, who made it their business to go from farm to farm, or cellar to cellar, and use their own equipment, conduct [21] the operations, and receive their compensation from the farmers, upon which compensation no contribution was or need be paid.

In respect to peas, the largest dealers in Idaho grew their own peas, on owned or leased land, and processed their own produce, the processing taking place off such land, in warehouses or sheds available to the tracks, performing the same operation as the defendant, but were not required to and did not pay any contribution with respect to employees engaged in such operations.

Aside from the produce raised by the defendant, the balance of such produce processed was that which the defendant purchased from the farmer-grower and found to be marketable after sorting and grading. The farmers delivered the produce at defendant's sheds, or warehouses, in half bags, as taken by them directly from the field, to enable the defendant and the farmers to determine the part to be purchased and prepared for market. As to potatoes, after they were processed, graded, packed and prepared for market, on consignment, and after the sale, the defendant, in case the farmer delivered the potatoes from the field, deducted the expenses from the sale price, including the charge for processing, grading, packing, and preparing for market, and a brokerage charge, and the balance was paid to the farmer. As to all the produce, the culls or other non-marketable portions thereof, went back to the farmer producer, or was disposed of as he directed, but did not go into the market.

In the case of peas, lettuce, and carrots, the defendant processed and sold that grown by him, and that which was not grown by him, he handled on consignment for the farmer-owner.

As to each of the products the processing operation was seasonal, at the time of harvesting the crops. In the district where the defendant operated, the harvest began about July 15th and was completed by September 15th. The processing, etc. [22] season as to onions began about August 15th, and continued until freezing, about November 1st, when the operation ended. To a small extent some onions were stored, either as purchased by the defendant or stored by the farmers, in the defendant's storage or elsewhere, and when ready to ship were processed and prepared for shipmnt. The storage period for onions ended in March. Processing operations on stored onions were not continuous or regular, taking place from time to time as market conditions justified and shipments were demanded, and crews of employees were picked up at the particular time as needed and then discharged.

All operations as to the harvesting, processing, packing, grading and shipping of lettuce are highly seasonal, beginning about October 1st and ending with severe frost about November 1st, and then they ceased.

In the case of carrots, the season's operations run for about one month, from September 15th to October 15th, and as to peas last one month, in June.

The work of employees, in the processing operations as commonly used in the state, did not require any special skill, and the work is largely done by transients, many only staying on the job for a day or two, although others may continue through the

particular season. Practically all of the growers of the produce, or the farm help, have the capacity or knowledge to perform any of the operations and type of work. Frequently the person who has been employed on the farm, in harvesting, comes into the processing sheds and is employed in the processing operation, and frequently a single employee would perform a number of different operations.

The operations which took place at the defendant's sheds, and which constituted "processing", were primarily cleaning, sorting, grading, and packing. The produce of the defendants' farming operations, and the produce of other farmers, were [23] intermingled, and went through the processing, packing, grading and preparing for market, together.

The potatoes would be delivered at the sheds, covered with dirt and intermingled with clods, vines, sticks, culls, and some bruised, cut, rotten and misshaped, just as dug from the ground. The vines and many of the clods were picked out by hand and other dirt screened out, and then were placed in a mechanical washer, partly for the purpose of precooling and partly to clean, and sometimes done by spraying with a hose. After being washed, the produce was placed on tables, where it was hand-sorted, graded and the marketable portion placed in bags and usually branded. After the sacks were sewed they were trucked by hand into the cars, where they were packed and stacked for shipment, and the cars iced. The potatoes discarded or refused went back to the producer, and where the de-

fendant bought the marketable portion, payment was made to the producer on the basis of the marketable portion ascertained.

In case of potatoes, the operation was sometimes done by the farmer himself on his farm, or at other suitable locations, or by traveling crews as part of ordinary farm operations. In case of onions, the same operation took place, except they were not washed. In case of lettuce, delivery was made by the farmer in his own truck, and defendant's crew took over at the shed, where the lettuce was trimmed, and the marketable heads were placed on a table and divided according to size and placed in crates with ice and stamped. The employees also prepared the ice, cleaned up the refuse and checked the amounts. In case of peas, delivery was made from the farm in sacks, contents were placed on a table and sorted, and then placed in hampers or tubs, which were labeled, and, after being placed in a tank of cold water, were taken into the car, and ice placed over the top for refrigeration. In case of carrots, they were tied in bunches on [24] the farm by the farmer producer, placed in crates and then delivered to the defendant, who then washed, sized, packed, and iced them, as was done with lettuce, and placed in cars.

Since the enactment of the Idaho Unemployment Compensation Law, and subsequent to the year 1938, the defendant here paid to the State of Idaho, under protest, contributions or taxes, computed upon wages for services of individuals employed in

connection with the processing operations, etc., here referred to, in the amount of $22,705.00, and the excise tax claimed by plaintiff on account thereof was $681.15, for 1938, and the defendant paid to the State of Idaho the sum of $613.04, leaving a balance of $68.11, which defendant paid to and was received by plaintiff. Thereafter, defendant here applied to the Industrial Accident Board of the state for a refund of all contributions paid, on the ground that the services and wages were "Agricultural Labor", and exempt under the Idaho law. Proceedings were had in the State Court, wherein the defendant was granted a refund of $571.33, as decided by the Supreme Court of the State of Idaho. (P. G. Batt, Appellant, v. Unemployment Compensation Division, Industrial Accident Board of Idaho, 63 Idaho 572, 123 Pac (2) 1004.)

We are therefore confronted with the specific problem as to what activities are involved here, as disclosed by the facts, in determining whether they come under the interpretation and meaning of the term "Agricultural Labor", as defined by the Ninth Circuit Court of Appeals, for it will be observed that the question has been decided by that Court on several occasions in similar situations, in the cases of North Whittier Heights Citrus Association v. National Labor Relations Board, 109 Fed. (2) 76, and Idaho Potato Growers v. National Labor Relations Board, 144 Fed. (2) 295. In the North Whittier Heights case the Court held that the activity in treating or processing of raw products, and marketing them, enters upon the status of "in-

dustry". In that [25] case the petitioner was a corporate body, consisting of farmers, an organized non-profit cooperative corporation, under the law, with a membership of about 200 citrus fruit growers, and engaged in receiving, handling, washing, grading, packing and shipping fruit of its members to market. The Court said:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry' ".

* * * * * *

"So to be agricultural labor, the work need not be strictly related to the crop, and every work related strictly to the crop is not of necessity agricultural labor and those doing it agricultural laborers."

* * * * * *

"The opinion in the case of Pinnacle Packing Co. v. State Unemployment Commission, supra, a case arising under a cooperative arrangement for processing and marekting fruit, contains some apt language. We quote: 'The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading,

packing and marketing, then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the Act and are not exempt as being engaged in agricultural labor.'

"We conclude that the workers in petitioner's packing house are not agricultural laborers and are therefore not exempt from the operation of the Act."

The conclusion reached by the Court in the North Whittier case was adhered to in the recent Idaho Potato Grower case, as the Court held the laborers occupy a similar status.

When we come to consider the status of the growers and the defendant here, as compared with the status of the parties, similarly situated, in the cases decided by the Ninth Circuit Court of Appeals, we find them to be materially the same, and the fact that the grower in the present case operates through the defendant as an individual, and not as a corporation, is not an essential difference; therefore, the conclusion here reached is that the services rendered were of a commercial nature, and an industrial activity, which takes them out of the "Agricultural Labor" exemption provided in the Act.

[26]

Attention is called to the decision in the case of Stuart v. Kleak, 129 Fed. (2) 400, the facts of which show that the type of work performed was confined exclusively to work upon the farm, and not

dustry". In that [25] case the petitioner was a corporate body, consisting of farmers, an organized non-profit cooperative corporation, under the law, with a membership of about 200 citrus fruit growers, and engaged in receiving, handling, washing, grading, packing and shipping fruit of its members to market. The Court said:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry' ".

* * * * * *

"So to be agricultural labor, the work need not be strictly related to the crop, and every work related strictly to the crop is not of necessity agricultural labor and those doing it agricultural laborers."

* * * * * *

"The opinion in the case of Pinnacle Packing Co. v. State Unemployment Commission, supra, a case arising under a cooperative arrangement for processing and marekting fruit, contains some apt language. We quote: 'The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading,

packing and marketing, then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the Act and are not exempt as being engaged in agricultural labor.'

"We conclude that the workers in petitioner's packing house are not agricultural laborers and are therefore not exempt from the operation of the Act."

The conclusion reached by the Court in the North Whittier case was adhered to in the recent Idaho Potato Grower case, as the Court held the laborers occupy a similar status.

When we come to consider the status of the growers and the defendant here, as compared with the status of the parties, similarly situated, in the cases decided by the Ninth Circuit Court of Appeals, we find them to be materially the same, and the fact that the grower in the present case operates through the defendant as an individual, and not as a corporation, is not an essential difference; therefore, the conclusion here reached is that the services rendered were of a commercial nature, and an industrial activity, which takes them out of the "Agricultural Labor" exemption provided in the Act.

[26]

Attention is called to the decision in the case of Stuart v. Kleak, 129 Fed. (2) 400, the facts of which show that the type of work performed was confined exclusively to work upon the farm, and not

in processing or marketing the crops raised thereon, and therefore, the facts are not similar to those in the present case.

In 1941 Congress enacted an Act (42 U.S.C.A. Subdivision 1, 4 of Section 409) broadening the term "Agricultural Labor" to now include "(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market * * * ", which does not apply to the present cause of action, but shows a recognition by Congress of the situation then existing, and the necessity for the remedial legislation, which it passed.

When we come to consider the further contention of the defendant that the Supreme Court of Idaho has held that such services and work were exempt under the Idaho Unemployment Compensation Law, in defining "Agricultural Labor", we find that the decision of the State Court is not binding upon the Federal Court, when an interpretation of the Federal Act is involved, and as the Ninth Circuit Court of Appeals has taken a different view, that is the law in this Circuit.

From what has been said, findings and judgment, in conformity with the conclusion here reached, will be entered, granting to the plaintiff judgment

against the defendant in the sum of $571.33, with interest and costs. [27]

[Title of Court and Cause.]

OPINION

Filed March 30, 1945

John A. Carver, United States District Attorney, E. H. Casterlin, and R. W. Beckwith, Assistants, Boise, Idaho. Attorneys for the Plaintiff.

William L. Langroise and S. S. Griffin, Boise, Ida., Attorneys for the Defendant.

March 30, 1945.

Cavanah, District Judge.

The defendant presents a petition for reconsideration and urges that the court eliminate consideration of "commercial" or "industry" and examine the "type of labor", and when done so as to farmers processing in Idaho, an essential agricultural activity under the stipulation of facts in preparation of vegetables for man's use and in their disposal by marketing or otherwise is exempt.

In the original opinion the court endeavored to relate fully the material facts, for it realized that the particular facts of each case must be separately considered in order to ascertain what is true "agricultural labor", for that is the [28] specific issue here under both the Social Security Act and the National Labor Relations Act.

The services here rendered in connection with farm products related to and extended beyond be-being engaged in the care, cultivation, picking, delivery of the products of the growers to be processed, graded and packed for market, for it is repeatedly stated in the stipulation of facts that the produce of both the defendant (and other growers which were intermingled), were, after being harvested, taken and delivered to the defendant at his warehouses or processing sheds in bags and trucks, and were taken by them directly from the field to enable the defendant and the growers to determine the part to be purchased and prepared for market. The handling of the produce from then on was by the defendant, who in some instances stored some of the produce, either as purchased by him or stored by the growers in the defendant's storage. The defendant bought the marketable portion and payment was made to the purchaser on the basis of the marketable portion and price ascertained. All expenses incurred, as labor or otherwise, in connection with handling the produce after it was delivered to the defendant by the growers, such as checking, keeping account of the amounts of sale prices, remitting to the growers, grading, packing, placing and packing on the cars and brokerage charges were deducted from the sale price. Some of the produce not bought by the defendant or not grown by him he handled on consignment. After the produce was processed, it was hand stored, graded, and the marketable portion placed

in bags and branded, and after the sacks were sewed they were trucked by hand into the cars where they were packed and stacked for shipment, and the cars iced. It appears that from the time that the growers delivered their produce to the defendant at his warehouses, they did nothing else in the handling of it and [29] were paid the sale price by the defendant after all expenses incurred in connection with the disposal and care of the produce by the defendant. The portion produced by the defendant was taken care of, and the same kind of services rendered as to the produce of other growers. Sometimes sales were made at the warehouses by the defendant and placed into cars on tracks alongside the warehouses. These are some of the specific activities of the defendant, and after considering them with other activities appearing in the facts, one is forced to the conclusion that from the time farm produce is delivered to the defendant and processed, agricultural labor ceases, and the activities of the defendant from then on are of a commercial character and enter the field of industry.

As stated in the original opinion of the court, the interpretation given to the term "agricultural labor" by the Ninth Circuit Court of Appeals is applicable to the facts in the present case, and when taken together with the kind of services rendered here and upon which the tax is levied, are of a commercial character and in the field of industrial activity and not exempt from the operation of the Act.

The petition for a reconsideration of the case is denied. Findings and decree will be filed and entered as stated in the original opinion. [30]

[Title of Court and Cause.]

FINDINGS AND CONCLUSIONS

This Cause, Having come on regularly for hearing, the court now enters its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

I.

That during the calendar year, 1938, the defendant, P. G. Batt, had individuals in his employ to whom he paid total wages in the amount of $30,198.38.

II.

That on January 26, 1939, the defendant filed with the collector of Internal Revenue for the collection district of Idaho, a return of excise tax for the calendar year, 1938, with respect to having individuals in his employ under Title 9 of the Social Security Act.

III.

That of the total amount of $30,198.38, so paid as wages, and reported the sum of $22,705.08 was paid as wages for services which were not agricultural labor, but were of a commercial character and in the field of industrial activity and were per-

formed within the United States by an employee for his employer and covered by provisions of Title 9 of the Social Security Act (49 Stats. 639; 42 USC 1101 et seq.); [31]

IV.

That the sum of $22,705.08 is subject to the tax thereon at the rate of 3% in the amount of $681.15;

V.

That the defendant paid the sum of $68.11 on January 26, 1939, on account of said tax, and the defendant is entitled to credit against the tax for contributions paid into the unemployment funds of the State of Idaho in the sum of $41.71, leaving a balance of $571.33 unpaid and owing to the United States of America as of January 26, 1939.

CONCLUSIONS OF LAW

I.

That the United States of America is entitled to a judgment against the defendant, P. G. Batt, for the sum of $571.33, together with interest thereon at the rate of 6% per annum, from January 26, 1939, together with its costs and disbursements incurred herein.

Let Judgment be entered accordingly.

Dated This 6th day of April, 1945.

CHARLES C. CAVANAH
District Judge. [32]

[Endorsed]: Filed April 6, 1945.

In the District Court of the United States, in and for the District of Idaho, Southern Division

No. 2266

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. BATT,

Defendant.

JUDGMENT

This Cause, Having come on regularly for hearing and Findings of Fact and Conclusions of Law in writing having been made and entered herein,

Now, Therefore, It Is Ordered, Adjudged and Decreed, That the United States of America, plaintiff, does have and recover from P. G. Batt, defendant, the sum of $782.72, together with its costs and disbursement assessed in the sum of $14.46.

Dated This 6th day of April, 1945.

CHARLES C. CAVANAH
District Judge.

[Endorsed]: Filed April 6, 1945. [33]

[Title of Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, That P. G. Batt, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth

Circuit from the final judgment in this action dated and entered the 6th day of April, 1945.

Dated, June 20th, 1945.

SAM S. GRIFFIN
W. H. LANGROISE

[Endorsed]: Filed June 20, 1945. [34]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES DISTRICT COURT TO TRANSCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 37, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of $7.10, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 2nd day of July, 1945.

[Seal] ED. M. BRYAN
Clerk. [38]

[Endorsed]: No. 11091. United States Circuit Court of Appeals for the Ninth Circuit. P. G. Batt, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed July 5, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the U. S. Circuit Court of Appeals
for the Ninth Circuit

No. 11091

P. G. BATT,

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPELLANT'S STATEMENT OF POINTS; AND STIPULATION FOR RECORD: UNDER RULE 19 CCA.

Pursuant to Rule 19 (6) of the Rules of the above Court, the appellant states the points upon which he intends to rely on the appeal as follows:

1. That the services of individuals in appellant's employment were, and the wages paid such individuals were for services in, agricultural employment, and were not subject to excise tax, but were excepted therefrom by Title 9 of the Social Security Act.

2. The trial court erred in

(a) Finding III that the services "were not agricultural labor, were of a commercial nature and in the field of industrial activity".

(b) Finding III that the services "were * * * covered by, and not exempt from the provisions of Title 9 of the Social Security Act (49 Stat. 639; 42 USC 1101 et seq.)"

(c) Finding IV that the sum of $22,705.08 is subject to tax thereon at the rate of 3% in the amount of $681.15.

(d) Finding V that "a balance of $571.33 (is) unpaid and owing to the United States of America as of January 26, 1939.

(e) Conclusions of Law I that the United States of America is entitled to a judgment against the defendant, P. G. Batt, for the sum of $571.33, together with interest thereon at the rate of 6% per annum from January 26, 1939 together with its costs and disbursements incurred.

Each of which is contrary to, and unsupported by, the evidence (Stipulation of Facts), and contrary to law, in that the services of individuals involved, and on account of whose wages tax is sought, were agricultural labor, and excepted from taxable services and wages by the statute; and contrary to and unsupported by the Court's opinion of March 30, 1945 to the effect that the services were processing services and ceased to be agricultural labor after processing, and only thereafter the activities of defendant were of a commercial character and entered the field of industry.

3. The trial court erred in entering judgment against defendant for any sum.

4. The trial court erred in not finding and concluding from the facts and law that the services and wages were in agricultural labor, and excepted from the tax; that no tax was payable; that judgment should be for defendant.

SAM S. GRIFFIN
W. H. LANGROISE
Attorneys for Appellant
Residence, Boise, Idaho.

DESIGNATION

The appellant and appellee, by their respective attorneys, stipulate the parts of the record which they think necessary for the consideration of the foregoing points, as follows:

1. Complaint (Record pp. 3-4)
2. Answer (Record p. 5)
3. Stipulation of Facts (Record pp. 7-16)
4. Opinion of District Court, March 15, 1945 (Record pp. 19-27)
5. Opinion of District Court, March 30, 1945 (Record pp. 28-30)
6. Findings and Conclusions (Record pp. 31-32)
7. Judgment, April 6, 1945 (Record p. 33)

SAM S. GRIFFIN
W. H. LANGROISE
Attorneys for Appellant
JOHN A. CARVER
United States District Attorney
E. H. CASTERLIN
Ass't. U. S. District Attorney
Attorneys for Appellee.

[Endorsed]: Filed Jul. 13, 1945. Paul P. O'Brien, Clerk.